FILED
JAN 13 1915
JAMES D. MAHER
CLERK

No. 647.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

LIEUTENANT COLONEL DANIEL C. STEARNS,
Complainant and Appellant,

v.

BRIGADIER GENERAL GEORGE H. WOOD,
Respondent and Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

SUPPLEMENTAL BRIEF OF RESPONDENT

HUBERT J. TURNEY,
DON R. SIPE,
NATHAN WM. MACCHESNEY,
of Counsel for Respondent and Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

LIEUTENANT COLONEL DANIEL C. STEARNS,
Complainant and Appellant,

v.

BRIGADIER GENERAL GEORGE H. WOOD,
Respondent and Appellee.

No. 647.

SUPPLEMENTAL BRIEF OF RESPONDENT.

To comply with the request of the court for citations mentioned in oral argument, and to present for consideration certain principles, which the time allotted did not admit of discussion owing to the magnitude of the subject, we present the following as supplemental only to the original printed briefs herein filed.

The term "militia" as used in the constitution referred to the total arms bearing population of the nation. The reference in argument to the first militia law is to the act of May 8, 1792, and is found in Volume 1, page 272, United States Statutes at large. So much of same as is necessary reads as follows:

"That each and every able-bodied white male citizen of the respective states, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five (except as hereinafter excepted) shall severally and respectively be enrolled in the militia of the captain or commanding officer of the company within whose bounds such citizens shall reside; and shall at all times thereafter be the duty of every such captain or commanding officer of the company to enroll every such citizen as aforesaid, and also those who shall from time to time arrive at the age of eighteen years, and under the age of forty-five years (except as before excepted) or shall come to reside within his bounds; and shall without delay notify such citizen of such enrollment by a proper noncommissioned officer to the company, by whom such notice may be proved. That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket, or fire lock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot pouch and powder horn, twenty balls suited to the bore of his rifle and a quarter of a pound of powder; and shall appear so armed, accoutred, and provided, when called out to exercise or into services; except that when called out to company days for exercise only, he may appear without a knapsack. That the commissioned officers shall severally be armed with

> a sword or hanger, and espontoon; and that from and after five years from the passing of this act all muskets for arming the militia, as therein required, shall be of bores sufficient for balls of the eighteenth part of a pound."

It clearly appears that the idea and purpose of the founders of our republic was that of the most extreme of democratic principles applied to universal military service. Military science was in its infancy. Slight training was deemed sufficient. The use of arms was familiar. The idea of a standing army was abhorrent. Therefore it was provided that the militia, or entire arms bearing population should receive equal training, each providing his own arms. If the constitutional provision be read "Congress shall have the power to use the entire arms bearing population to execute the laws of the Union, suppress insurrection and repel invasion," we shall then express the intent of the writers thereof, and accurately comprehend both their thought and purpose.

The Standard Dictionary, Volume s, Page 376, Subject "Militia," gives under paragraph three:

> "In the United States, able-bodied men over eighteen and less than forty-five years of age, amenable to military service."

The opinion of a former Attorney General which we are informed is in part relied on by our op-

ponents, is found in Vol. 29, Opinions of Attorneys General, Page 322.

The reasoning in support of the opinion is found on page 323, where a differentiation is sought to be made between the militia and the regular army, in these words: "It, (the constitution) is speaking of two different bodies: the one, the Regular Army,—the other body for domestic service."—

This entire opinion therefore, turns on fundamental error. At the adoption of the constitution there was no regular army, and none for long thereafter; and when created its members were simply selected members of the militia, still possessing their identity as such; assembled and trained under the constitutional power granted congress to raise and support armies, under which provisions together with the provision making the President Commander-in-Chief, and the power vested in Congress to declare war, and the purpose clause "To provide for the common defense," the National Guard or any other selected armies of Militia may be used wherever national honor may require.

The error made by our opponents, and upon which point this issue turns, is in applying the secondary, acquired, and wholly modern use of the word "militia" in the construction thereof, where found in our constitution, instead of the definition of the word as then used and as then universally understood.

Standard works on English literature abound in like instances of changed and acquired meanings of words. One authority has sought a classification into words, the meaning whereof has been (1) extended, (2) restricted, and (3) otherwise changed. The word "Militia" as popularly used comes under (2), although all standard dictionaries still give the original meaning as used in our constitution as the primary definition.

Trench, Study of Words, Chap. 3, and Emerson's History of the English Language give scholarly and intensely interesting discussions of the gradual mutation of meaning in words by which occur radical departures from original signification.

This change of meaning here fraught with such vast consequence can be accurately traced. For a few years, among a peaceful people, and with no immediate necessity for troops except as protection against Indians, the militia system worked fairly well; but a system contemplating every man of military age of the nation supplying his own arms and doing his equal proportion of military duty meant an unwieldy body of indifferently armed and slightly trained infantry. The War of 1812 demonstrated that, while the issue of a battle might depend upon the fire of infantry, that they must be uniformly armed, systematically trained, and supplemented by other arms. Even before, the necessity for artillery and technical training fore-

shadowed the utter abandonment of the system. The regular army and the National Guard, being alike composed of selected and trained members of the militia, came into being, and the word "militia" became to be restricted to the National Guard in popular adaptation.

Now congress, aided by the states, had then simply availed itself of its right and duty to raise and support armies. After successive reorganizations, congress by law recognized the principle in the latest militia act, and speaks in terms of the "unorganized" militia, or total unorganized arms bearing population, and the "organized" militia. Organized into what? Clearly, into armies. By authority of what? Clearly, the Federal government.

The right to raise and support armies is vested in congress and denied the states by the constitution. It could not have been contemplated that while the militia system was to be used in the new republic, while the militia was to include the entire arms bearing population, while Congress might raise and support armies thereof and declare war, yet it might not use the armies so created to do other than repel an invasion by the power against which it had so declared war.

The true principle is that the Constitution in vesting in congress the power to use the total arms bearing population to execute the laws of the Union, suppress insurrection, and repel invasion,

in no way limited its other and further powers or the power inherent in National sovereignty to use them otherwise when so raised into armies; the right to declare war, and the implied right or the right inherent in National Sovereignty to use all the militia or arms bearing population if necessary in its successful prosecution. This being true, the relator is bound to obey an order preparatory to, or any subsequent order carrying into effect a mobilization beyond the limits of the United States.

The relator is an officer of a military body, wearing a distinctive uniform, governed by the rules and articles of war, trained in military science, and which body is organized into infantry, artillery, cavalry, engineers, signal corps, sanitary troops, and the several departments. This comprises everything contemplated in the definition of *Troops*.

The constitution denies to the states the right to "keep troops." Article 1, Section 10. By a law of congress and War Department, Circular 8 thereunder, the rank and pay of relator is limited. The limiting power being the only one in which the right to "keep troops" is vested, the right of an officer thereof to except to a strict enactment promulgated thereby, under an alleged right more liberal but derived from a state authority to which the right to keep troops is denied, must fail.

And thus both the questions raised in this action must be answered as follows:

First. The right to raise and support armies being vested in congress, and the right to keep troops denied to the states, the supreme and exclusive control of the troops or armies composing the National Guard is vested in congress, with the sole exception of the appointment of the officers and training the militia according to the discipline prescribed by congress. An act of congress therefore with respect thereto, vesting lawful authority in the Secretary of War, and a lawful enactment of the Secretary of War thereunder, supersedes a law of a state inconsistent therewith or contradictory thereto, or a regulation thereunder by authority thereof.

Second. The right vested in congress to use the militia to execute the laws of the Union, suppress insurrection and repel invasion, is declaratory of its right to use the entire arms bearing population of all the states for the indicated purposes; and does not limit the right of congress to use the National Guard or other troops or armies raised therefrom for other lawful purpose, foreign or domestic.

In conclusion we wish to urge upon the court the overwhelming importance of the matter under discussion. Under our system, military service is voluntary. Our young men enlist actuated by patriotism alone. They undergo years of patient preparation that they may be a prepared and avail-

able force for service in war. By an opinion rendered without consultation with or warning to or any opportunity given the organizations affected to present these and other considerations, an opinion was rendered by a former Attorney General that this trained force comprising five-ninths in number of our total military national strength is unavailable under our constitution for foreign service. It has been humiliated. The teachings of its officers have been denied. The representations of its recruiting officers to patriotic youth have been declared false. The chief and best incentive to service has been withdrawn. Needed and constructive legislation and vitally necessary appropriations have been delayed and are still delayed.

If this opinion be correct, then in future war after the declaration thereof, this force must be dissolved and a new one created. The time necessary for the transfer would be sufficient to cause national humiliation and a destruction like that of Belgium. The time of many officers would be wasted at a time when their services were most vitally needed in raising new troops for a second line. Battle ships which might meet and check an invasion in midocean could not leave the docks for want of a sufficient complement of officers and men; for the trained members of our naval militia, whose natural and primary function is service beyond the limits of the United States, could not be

used beyond a marine league from our shores without violating the constitution.

Officers leaving their homes and business and freely offering their lives in modern warfare would be deprived of all their longevity pay for their years of National Guard service, rendered without pay and in preparation for this event. No officer would be certain that he would in the reconstructed force be commissioned to command the organization trained by him for the acid test of war, therein. A period of chaos would be made necessary in an emergency when order would mean the lives of many individuals if not that of the nation; it would mean vast expenditures of funds for new equipment of the new force, dissentions caused by the influential seeking commissions and to supplant those serving; an invitation to defeat or the postponement of success; the lengthening of a conflict, unnecessary loss of life and treasure, and the mortgaging of posterity for pensions.

That this opinion has not ruined the morale of the National Guard, directly reflects its faith that this court would, when the opportunity arose, interpret the constitutional provisions indicated according to the true intent and spirit of the makers thereof, according to the correct principles of law and reason, and according to the high hopes and disinterestedly patriotic aims of the one hundred and thirty thousand officers and men of the Na-

tional Guard who ask but the right to serve their country.

Respectfully submitted,

HUBERT J. TURNEY,
The Judge Advocate General of Ohio.
Of Counsel for Respondent and Appellee.